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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 474

KEVON A. AKOPIANTZ,
Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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printed IN CALIFORNIA STATE PRINTING OFFICE

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LEVON A. AKOPIANTZ,
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BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Board of Medical Examiners of the State of California respectfully submits its opposition to the petition for writ of certiorari as follows:

REASONS WHY PETITION SHOULD NOT BE GRANTED

It is respectfully submitted that the petitioner has not presented a federal question of substance which should be determined by this Honorable Court. This case deals with the well-recognized right of a state

to deny licensure as a physician and surgeon to an applicant who had not met reasonable state requirements. The petitioner had not fulfilled the educational requirements for direct reciprocity without examination set up by the State of California in that he had been trained in foreign medical schools none of which were approved and some of which were disapproved and had failed to prove his educational background was equivalent to that required for California licensure.

These California educational requirements are constitutional and within the well-recognized power of the state to regulate the practice of medicine and to require reasonable educational requirements of an applicant to protect the health and safety of the people.

Dent v. *West Va.*, 129 U.S. 114, 122-123;
Reetz v. *Michigan*, 188 U.S. 505, 510;
Watson v. *Md.*, 218 U.S. 173, 176-177;
Steinbach v. *Metzger*, 63 F. 2d 74, 76-77; 41 Am. Jur. §37, p. 166.

QUESTIONS PRESENTED

1. Are medical licensing reciprocity statutes of California constitutional when they require an applicant for a reciprocity license without examination to prove his educational qualifications were equivalent to those required of applicants in California at the time he received his license in another state?

2. Has the petitioner been discriminated against or denied due process or equal protection of law?

STATEMENT OF THE CASE

The petitioner filed an application before the Board of Medical Examiners of the State of California in February 1953 seeking a reciprocity license without any examination based on the fact that he had been issued a certificate to practice medicine in the State of New York on July 1, 1949. A hearing was held before the Board of Medical Examiners on June 21, 1954, where the significant issues raised were:

(a) Whether Akopiantz's resident professional instruction equalled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects equivalent to those stated in section 2192 of the Business and Professions Code and were equivalent in quality, standard and excellence to the minimum requirements specified in Articles 4 and 5 (sections 2165-2195) of Chapter 5 of Division 2 of said code; and

(b) Whether the California State Board of Medical Examiners had determined the equivalence of the requirements of the New York licensing authority with respect to professional instruction in the schools of medicine which petitioner attended, for the purposes of issuing (and did issue) reciprocity certificates to Howard

Golden and Leonard S. Lazeroff in 1945 and 1946 respectively.

Akopiantz v. *Board of Medical Examiners* (1956), 146 Cal. App. 2d 331, 332, 304 Pac. 2d 52.

The petitioner's case before the Board of Medical Examiners consisted of his own testimony, his educational credentials and certain letters. With respect to his education he testified he graduated from high school in the State of New York and also graduated from the New York University with the degree of bachelor of science. He obtained the degree of doctor of medicine from the University of Lausanne in Switzerland which he attended from March, 1940, to June, 1941 (Board Tr., p. 6). Prior to attending the University of Lausanne he attended Anderson College of Medicine and St. Mungo's College of Medicine, extramural schools in Glasgow, Scotland, from October, 1936, to June, 1938 (Board Tr., p. 6). These extramural schools did not give any degree. Then petitioner transferred to Cambridge University to obtain one (Board Tr., p. 7). He attended Cambridge in England from October, 1938, to June, 1939 (Board Tr., p. 6).

In 1948, some seven years after he had graduated from the University of Lausanne in Switzerland, he applied for the New York State examination and took the examination before he left for Arabia. He was not completely successful in passing the examination but after repeating two subjects he secured a

passing grade and received his certificate on July 1, 1949 (Board Tr., pp. 5, 11). Thus eight years elapsed between his graduation from Lausanne and his becoming licensed in New York, and during this period he was not licensed elsewhere in the United States (Board Tr., p. 29). While Levon Akopiantz claims to be eligible for his American Board of Surgery and American Board of Thoracic Surgery, and the American College of Surgeons, he was not a member of any of these boards (Board Tr., pp. 21-22).

The petitioner took 3,743 hours at Lausanne and was given advanced standing there and credit for 2,423 hours of which 1,181 hours were taken at Cambridge University (Board Tr., p. 18). He was first given credit for 1,251 hours of work taken at extramural schools (Board Tr., p. 33, Petitioner's Petition, p. 15a, footnote).

Petitioner testified that the training received in the Scottish schools was equivalent to the extramural schools in this country (Board Tr., p. 15, ll. 5-8). His opinion was based upon his comparison of those schools with New York Medical College and Jefferson Medical College (Board Tr., p. 16).

The petitioner admitted before the Board of Medical Examiners that the extramural schools did not have extensive research activities. He further admitted that they did not have extensive animal surgery. He conceded that the teaching rooms were small, but claimed they were adequate. He stated that the

course on pathology was taken in conjunction with the university students (Board Tr., pp. 36-37). He further admitted that students did not take an examination every four to six weeks, but only at the end of the course (Board Tr., p. 49). He criticized Dr. Rappleye's report on the extramural schools by challenging the doctor's criticism of the caliber of the examinations given to the extramural students. The petitioner denied that the examinations for the university students were more difficult than those given to extramural students claiming that if one compared the examination questions they would find that the same questions and answers appeared in both examinations. No comparative examinations were introduced by him (Board Tr., p. 377, ll. 17-25). He admitted there was no roll call by the professor and the students merely signed in class (Board Tr., p. 52).

The semesters at Lausanne were four months in duration. He spent 52½ weeks at Lausanne and did not go to school on Sunday, nor on every Saturday (Board Tr., p. 54). Classes ran from 8 in the morning until 8 at night, and some classes until 10 at night (Board Tr., pp. 54-55). This averaged out to 72 hours a week on a 52 week basis (Board Tr., p. 56), or over 13 hours a day on a five-day schedule (Board Tr., p. 57).

None of the schools attended by the petitioner had ever been approved by the Board of Medical Examiners. With regard to the extramural schools, the

Board of Medical Examiners on October 19, 1939, adopted the following resolution:

> "'Reliable information is at hand showing that the extramural medical schools of Great Britain are operating under standards far below those of the regularly approved medical schools of Great Britain and the U.S.A. Therefore, the committee recommends that it be the policy of this Board that any application for a California medical license based upon medical credits from any of these extramural medical schools of Great Britain be denied, on account of low standards of medical education. This recommendation is based in part on a report on the extramural medical schools of Great Britain prepared for the New York Board of Regents by Dr. Willard C. Rappleye, Dean of Columbia University, College of Physicians and Surgeons, and adopted by the medical licensing authorities of the State of New York. A similar resolution has been adopted by the National Board of Medical Examiners.
>
> "'Moved by Dr. Geistweit, seconded by Dr. Thomason, that the Report of the College Investigation Committee on Calendars 20, 21, 21-a and 22 be adopted. Carried.'"

Dr. John Golden was granted a reciprocity license on November 16, 1945, and Dr. Leonard S. Lazeroff was also issued a reciprocity license on May 7, 1946, on allegedly similar professional educational backgrounds to that of the petitioner.

After those admissions the Board of Medical Examiners on August 8, 1946, adopted the following resolution:

> "'(a) Regarding extramural schools of Scotland.
>
> "'All extramural schools in Scotland be and they are hereby disapproved as of this date. Upon consideration of its past actions on schools, the Board finds that these schools have never been approved by this Board for resident professional instruction in medicine and surgery, and further finds that said schools were expressly disapproved by this Board as of the date of October 1, 1939.
>
> "'Moved by Dr. Dolman, seconded by Dr. Thomason, that this resolution be accepted. Carried.'" (Board Tr., pp. 62-63.)

A copy of the Rappleye report, which was prepared by Dean Rappleye of Columbia University, College of Physicians and Surgeons for the New York Board of Regents, was introduced in evidence at the hearing (Board Exhibit 3, part of Exhibit A). The report was based upon personal visits made by Dr. Rappleye to inspect the extramural schools of Scotland in November, 1938, and discussions which he had with public officials and persons in the field of medical education in Great Britain. The report points out that the extramural schools developed for the specific purpose of training students to pass the examinations given by five licensing corporations and not to grant degrees in medicine. Graduates of the regular university medical schools in Great Britain, of which there were 18,

automatically were admitted to the medical register and could practice. Other persons had to pass the examinations given by one of the five licensing corporations. In all respects the requirements and standards of the licensing corporations, which were not instructional institutional bodies, were below those of the university. Insofar as the extramural schools were concerned, he reported that students could not qualify for the medical register on the basis of completion of courses there, but had to pass an examination given by one of the five licensing corporations. The quality of students was not good comparatively speaking, because a large portion of them were students who were either not able or would not have been able to get in an approved school in this country. Some students had actually been dropped from medical schools in the United States. Moreover, there was no screening process to weed out undesirable students since there was only a casual appraisal of the qualifications of the applicants.

The report is in evidence (Exhibit 3, part of Exhibit A). The observations in the report were that the facilities were inadequate, classes too large, training mostly didactic rather than functional, inadequate number of cadavers and no quarters for animals. Most of the instructors were active practitioners who were paid on the basis of the number of students they taught rather than any salary basis, and were not men specifically qualified in the sciences. Everyone connected with the universities and medical schools was of the

opinion that these schools maintained standards below those of the university schools and should be discontinued. At the conclusion of the hearing the Board of Medical Examiners found that:

> "It has not been shown that said resident professional instruction described and referred to in Finding of Fact III hereof, equaled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects of instruction equivalent to those stated and set forth in section 2192 of the Business and Professions Code and were in all respects equivalent in quality, standard, and excellence to the minimum requirements specified in Articles 4 and 5, Chapter 5, Division 2 of said Code."

The Board of Medical Examiners further found in Finding of Fact VII as follows:

> "Credit given at St. Mungo's Medical School and the Anderson College of Medicine hereinabove referred to in Finding III, was for work completed in extramural medical schools, which are schools unapproved by the Board of Medical Examiners of the State of California. Extramural schools were expressly disapproved by the Board of Medical Examiners of the State of California as of the date of October 1, 1939."

Akopiantz v. *Board of Medical Examiners* (1956), 146 Cal. App. 2d 331, 304 Pac. 2d 52.

The Board of Medical Examiners then denied the application for reciprocity without examination on July 1, 1954.

The petitioner filed a petition for writ of mandate in the San Francisco Superior Court and after that court's decision the District Court rendered a decision remanding the matter because of irreconcilable findings.

Akopiant v. *Board of Medical Examiners* (1956), 146 Cal. App. 2d 331, 304 Pac. 2d 52;
Petitioner's Petition, 15a-21a.

Upon the remand further proceedings were had in the superior court, at which time Wallace W. Thompson, Executive Secretary of the Board of Medical Examiners, provided the Honorable Preston Devine with certain information which the court indicated it wished to hear in order to determine whether or not it would take judicial notice of certain facts (RT, pp. 68-87). The court also entertained the petition of the petitioner to direct the respondent Board of Medical Examiners to approve retroactively St. Mungo's College of Medicine and Anderson College of Medicine, both of Scotland (CT, p. 5, ll. 15-21, p. 16, ll. 8-14). See Section 2174, Business and Professions Code, *infra*.

After reviewing all of the evidence and the evidence which had been presented to the Board of Medical Examiners, the Honorable Preston Devine issued his judgment denying the petition for writ of mandate to direct the respondent Board of Medical Examiners to issue a reciprocity certificate to the petitioner and also denied the petition to direct the respondent Board of Medical Examiners to approve retroactively St.

Mungo's College of Medicine or Anderson College of Medicine, both of Scotland (CT, p. 5, ll. 1-23).

The District Court of Appeal of the State of California affirmed the judgment (Vol. 190 A.C.A. 114; pp. 2a-14a of Petition for Certiorari filed by Levon A. Akopiantz). The district court denied the petition for rehearing and the California Supreme Court denied a petition for hearing without opinion.

STATUTES INVOLVED

As of the date of petitioner's application for a reciprocity certificate without examination, namely, in February 1953, the following statutes and provisions of the California Business and Professions Code were pertinent:

> "2310. The board [of Medical Examiners] shall issue a reciprocity certificate to an applicant to practice a system or mode of treating the sick or afflicted in this State that he is authorized to practice in any other State if it is a system or mode that is recognized by this chapter or any preceding practice act. Subject to the provisions of sections 2320 and 2321, no examination for any reciprocity certificate shall be required." Cal. Stats. 1937, p. 1269.
>
> "2316. He shall inform the board on his application form of all institutions from which he has graduated and of all institutions at which he has studied and the period of this study.
>
> "The requirements of the college from which he has graduated and the requirements of the medical licensing authority shall not have been at the time

his certificate was issued in any degree or particular less than those which were required for the issuance of a similar certificate to practice a system or mode of treating the sick or afflicted in this State at the same time." Cal. Stats. 1937, p. 1270.

"2316.5. An applicant for a reciprocity certificate shall prove that a diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the board was a condition precedent to his admission to the examination for the license upon which his application for a certificate in this State is based" (Cal. Stats. 1943, p. 2081).

"2317. He shall submit evidence of his own and from the medical licensing authority, which is satisfactory to the board and which shows that the requirements of the authority for a certificate permitting him to practice a system or mode of treating the sick and afflicted at the time it was issued, were not in any degree or particular less than those which were required for the issuance of a similar certificate to practice a system or mode of treating the sick and afflicted in this State at the same time" (Cal. Stats. 1937, p. 1270).

"2320. The board may make an independent investigation of the educational qualifications and the character, ability and standing of the applicant.

"If, after this investigation and any other or further examination or investigation which the board may see fit to make on its own part, it is found that the requirements of the medical licensing authority issuing his certificate were in any degree or particular less than the requirements

provided by the law of this State at the date of the issuance of his certificate, or that the applicant has not complied with one of the alternatives provided by section 2319, he will not be entitled to practice in this State without examination" (Cal. Stats. 1937, p. 1271).

"2174. If any school is disapproved by the board or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court against the board to compel it to approve the school or to admit the applicant to examination or for any other appropriate relief. In such an action the court shall proceed under Section 1094.5 of the Code of Civil Procedure; provided, however, that the court may not exercise an independent judgment on the evidence. The action shall be speedily determined by the court and shall take precedence over all matters pending therein except criminal cases, applications for injunction, or other matters to which special precedence may be given by law. The action shall be commenced and tried in the Superior Court of the State of California, in and for the County of Sacramento." (Cal. Stats. 1947, p. 1368.)

"2193 (Stats. of 1941): An applicant, whose application is based on a diploma issued to him by a foreign medical school approved by the board, except a Canadian school, shall furnish documentary evidence, satisfactory to the board, that:

"(a) He has completed a resident course of professional instruction in an approved medical school or schools equivalent to that required in this article for a physician and surgeon applicant.

"(b) Subsequent thereto, he has had issued to him by an approved medical school, a medical diploma, as evidence of the completion of the course of medical instruction required in this chapter.

"(c) He has been admitted or licensed to practice medicine and surgery in the country wherein is located the institution in which he has completed the resident courses of professional instruction required under this chapter.

"(d) He has completed either the senior or fourth or final year in an approved medical school in the United States, or in lieu of this, that he has served at least one year in residence in a hospital located in the United States and approved by the board for training of internes.

"(e) If the applicant is not a citizen of the United States, the country in which he has been licensed to practice medicine and surgery will admit to practice therein citizens of the United States upon proof of prior admission to practice medicine and surgery in some State of the United States or upon proof of matters similar to those required in this section for graduates of foreign medical schools.

"Sec. 2. Subdivision (c) added to Section 2193 of the Business and Professions Code by this amendatory act does not apply to any person who on March 31, 1941, was registered as an interne under Chapter 5 of Division 2 of the Business and Professions Code, relating to the practice of medicine" (Cal. Stats. 1941, p. 2287).

"2193 (Stats. of 1949). An applicant, whose application is based on a diploma issued to him by a foreign medical school, except a Canadian school,

shall furnish documentary evidence, satisfactory to the board, that:

"(a) He has completed in a medical school or schools a resident course of professional instruction equivalent to that required in this article for a physician and surgeon applicant.

"(b) Subsequent thereto, he has had issued to him by such medical school, a medical diploma, as evidence of the completion of the course of medical instructions required in this chapter.

"(c) He has been admitted or licensed to practice medicine and surgery in the country wherein is located the institution in which he has completed the resident courses of professional instruction required under this chapter.

"(d) He has completed either the senior or fourth or final year in an approved medical school in the United States, or in lieu of this, that he has served at least one year in residence in a hospital located in the United States and approved by the board for training of internes.

"(e) If the applicant is not a citizen of the United States, the country in which he has been licensed to practice medicine and surgery will admit to practice therein citizens of the United States upon proof of prior admission to practice medicine and surgery in some state of the United States or upon proof of matters similar to those required in this section for graduates of foreign medical schools.

"(f) Nothing contained in this section shall prohibit the board from disapproving any foreign medical school nor from denying the application if, in the opinion of the board, the instruction

received by the applicant or the courses were not equivalent to that required in this article for a physician and surgeon applicant.

"(g) Applicants under this section must pass a written, clinical, and oral examination before a certificate may be issued by the board" (Cal. Stats. 1949, pp. 930-931, effective Oct. 1, 1949).

ARGUMENT

1. The Medical Licensing Statutes of California which require an applicant for a reciprocity license without examination to prove his educational qualifications were equivalent to those required of applicants in California at the time he received his license in New York are constitutional.

The petitioner seeks to practice medicine in California upon a reciprocity basis without examination on the basis of the fact that he was licensed to practice medicine by the New York authorities on July 1, 1949.

It is apparent from a reading of Sections 2316, 2317 and 2320 of the California Business and Professions Code that the California law requires two definite things in order for a person to be admitted without examination in this State:

1. The requirements of the college from which he has graduated should not have been *in any degree or particular* less than those which are required in this State of an applicant.

2. The requirements of the medical licensing authority shall not have been at the time his certificate was issued *in any degree or particular* less than those

which were required for the issuance of a certificate in California.

These statutes clearly indicate the purpose of the California Reciprocity Law in this field. The legislative intent was obviously to permit qualified persons to practice in this state without further examination (B. & P. Code, Sec. 2310). This privilege was conditioned upon a proper showing that they had the requisite resident instruction both in quantity and quality, and if they could further show that they had taken an examination in another state which is comparable to the examination which is required in California. It is clear that the Legislature in no way intended to relax the requirements in the State of California or to permit persons to practice in this State who could not have qualified for an examination here, but who had gone to another state which had less stringent requirements and where they were successful in being admitted to practice. Stated in other terms, the mere fact that a person has been admitted to practice in another state does not qualify him per se for a reciprocity certificate in California.

These reciprocity statutes which require the petitioner to meet California educational requirements existing as of the date he became licensed in New York are well within the power of the state in regulating the practice of medicine recognized in *Dent* v. *West Virginia*, 129 U.S. 114, 122-123; *Reetz* v. *Michigan*, 188 U.S. 505, 510; *Watson* v. *Maryland*, 218 U.S.

173, 176-177; and *Steinbach* v. *Metzger*, 63 Fed. 2d 74, 76-77.

Sections 2316 and 2317 are expressly clear that the controlling date is the date on which the applicant was licensed in the state which issued the certificate upon which the claim to reciprocity is based. Therefore, if the petitioner in this case could have come to California and qualified for the examination here on July 1, 1949, then he would be entitled to a reciprocity license, but if he could not have qualified on July 1, 1949, in California he could not obtain the right to practice in California by becoming licensed in another state.

The California law at the time petitioner attended the University of Lausanne, and at the time he obtained his license in New York on July 1, 1949, required that an applicant for a certificate to practice medicine and surgery in this State take his medical training in an approved school, and that he graduate from an approved school. It was not until a 1949 amendment to Section 2193 of the Business and Professions Code (effective October 1, 1949, Stats. 1949, p. 931) and after petitioner was admitted in New York, that the Legislature eliminated the requirement that the foreign schools which the applicant attended must be approved by the California Board (Cal. Stats. 1937, Ch. 414, p. 1377, as amended by Cal. Stats. 1939, Ch. 281, p. 1537, and Cal. Stats. 1941, Ch. 751, p. 2287). The 1949 amendment to Section 2193 also provided that all graduates of foreign medical schools must pass

a written, clinical and oral examination (Cal. Stats. 1949, p. 931).

The University of Lausanne at Switzerland and the University of Cambridge have never been approved by the California Board of Medical Examiners. The extramural schols, St. Mungo's College of Medicine and Anderson College of Medicine in Scotland, which the petitioner attended, were not only never approved by the Board, but were expressly disapproved by it in 1939 and 1946. Thus, it is apparent that the petitioner could not have qualified for the examination to practice medicine and surgery in the State of California in 1949 at the time he applied for a New York certificate. It also follows that the New York authority standards were not equivalent to California standards, or using the language of Sections 2316 and 2317, were in some degree and particular less than those of the State of California, since the New York authority permitted the petitioner to take its examination upon qualifications which would not have been satisfactory in California (see Memorandum Opinion of Judge Preston Devine, CT pp. 6-9). If petitioner had applied in California for an examination in 1949 he would not have been permitted to take the examination because of the Board's actions in twice disapproving the extramural schools. He therefore should not be permitted to circumvent that action by becoming licensed in New York under more lax conditions and attempting to require California to accept him.

No doubt New York felt obligated to permit the petitioner to take the examinations (which he failed to pass completely on the first attempt, Board Tr., p. 11, ll. 17-22) since the petitioner had received assurance from the New York Board prior to entering St. Mungo's that if he attended he would be eligible for admission to the New York State medical licensing examination (letter of Dr. Rippin, dated October 28, 1936, Exhibit B-4 before board and superior court). He had no such assurance from California.

Likewise, the standards of the University of Lausanne were not equivalent because not only was it not approved by the board, but it gave the petitioner substantial credit for courses taken in other schools which were never approved and had actually been disapproved by the California board at the time the petitioner attended the University of Lausanne (note the finding of the trial court, CT No. 2, p. 4, ll. 3-11).

The petitioner argues that because the State of California has granted reciprocity to certain licentiates of New York that it, therefore, recognizes that the standards of New York are comparable to those of California. However, it does not follow that because California may generally accept licentiates of New York on a reciprocity basis that it must follow this in each and every case. The reciprocity law does not make the board a rubber stamp of the act of medical authorities of other states; to the contrary, the wording of the law is such that the board is not obligated

to accept the determinations made by the licensing authorities of other jurisdictions, but is free to determine for itself whether or not any particular applicant can meet the requirements of California law. If the Legislature had intended the board to be bound by the action of other licensing authorities, it would simply have said this; instead, it placed the requirements in the reciprocity law that the instruction received by the applicant must have been *equivalent* to that which would have entitled the applicant to admission in California, and that the requirements of the licensing boards in other states must be at the same level as those in California.

See *Arwine* v. *Board of Med. Examiners* (1907), 151 Cal. 499, 502, 91 Pac. 319.

Not only is this indicated by the language found in Sections 2316 and 2317 of the Business and Professions Code, but the courts in construing the reciprocity provisions have consistently indicated that the respondent is not bound by the acts of the licensing authority of other states.

Mann v. *Board of Medical Examiners* (1947), 31 Cal. 2d 30, 187 Pac. 2d 1;
Herzig v. *Board of Medical Examiners* (1933), 135 Cal. App. 41, 26 Pac. 2d 513;
Arwine v. *Board of Med. Examiners* (1907), 151 Cal. 499, 502, 91 Pac. 319.

The court in the *Mann* case, at 31 Cal. 2d 41, held that the board had no power to admit the applicant to practice medicine in California upon a reciprocal

basis since he had not graduated from an approved school. Not only did this follow from the general requirements of the State Medical Practice Act as it read on July 1, 1949, but as the court pointed out in the *Mann* case, by the very provisions of the reciprocity portion of the law itself, wherein the court pointed out that Section 2316.5 of the Business and Professions Code provides:

> "An applicant for a reciprocity certificate shall prove that a diploma or other evidence of final, successful and entire completion of instruction and *training required by a school approved by the board* was a condition precedent to his admission to the examination for the license upon which his application for a certificate in this State is based" (added by Cal. Stats. 1943, Ch. 530, p. 2081) (emphasis added).

Contrary to the statement made by petitioner at page 11 of his petition, the California board has never in effect found that the New York requirements equal those of California and the California District Court of Appeal clearly held that the New York standards in July, 1949, were not the equivalent of the California standards at that time (Petr.'s Pet., p. 11a, ll. 5-7).

The petitioner complains that the respondent invalidly under Title 16, California Administrative Code, Section 1330(f), requires reciprocity applicants who are graduates of foreign medical schools to take written, oral and clinical examinations. That rule of the board is merely supplementary to the statutory

requirement set up by the Legislature in Section 2193 (Cal. Stats. 1949, p. 930, effective 10 1 49) of the Business and Professions Code wherein all graduates of foreign medical schools not disapproved by the board are required to take written, oral and clinical examinations.

The board's records show that no graduate of any foreign medical school has been admitted to practice in California since 1949 without taking the written and oral examinations (RT No. 2 p. 80, ll. 1-10).

The Legislature certainly has power in its discretion to make such a requirement if it deems such safeguards necessary to protect the health and safety of the people of the State of California, especially in view of the impossible task of attempting to keep abreast of the professional caliber of education which might be given in foreign medical schools. Section 2119 of the Business and Professions Code authorizes the board to pass such rules. It is well settled that an administrative rule which fulfills the purpose of the law is valid and will be respected by the courts.

Knudsen Creamery Co. v. *Brock* (1951), 37 Cal. 2d 485, 492-493, 234 Pac. 2d 26.

2. The petitioner has not been denied due process and equal protection of the law, nor has the respondent board discriminated against petitioner.

The petitioner argues that since Drs. Golden and Lazaroff who were admitted to practice in California on a reciprocity basis in 1945 and 1946, respectively,

also attended the extramural schools and the University of Lausanne, that he, too, should have been admitted to practice in California in 1953. In this connection it is his premise that the admission of these two applicants constitutes an approval of the extramural schools and he reasons from this that the Board's refusal to admit him without examination constitutes an unconstitutional discrimination against him. The identical argument has been made and rejected by the courts of this State in other cases. In the *Moon* case, 31 Cal. 2d 30, at page 39 [187 Pac. 2d 1], Mr. Justice Carter expressly rejected this contention. He also stated at page 41 that "No denial of any constitutional right or discrimination or arbitrary act against petitioner is shown."

Likewise in the case of *Herzig* v. *Board of Medical Examiners* (1933), 135 Cal. App. 41, 26 Pac. 2d 513, in his concurring opinion at page 45, Judge Conrey considered the same proposition and concluded: "I think that these particular instances were not sufficient to overcome the effect of the formal resolutions adopted and maintained in force by respondent."

The courts of other jurisdictions have likewise reached the same conclusion.

Lake v. *Mercer* (Sup. Ct. S.C. 1950), 58 S.E. 2d 336, 338;

Erlanger v. *Regents of University* (N.Y. Sup. Ct., App. Div. 1900), 10 N.Y.S. 2d 1013, 1018, 256 App. Div. 444, 449.

Both these admissions took place prior to the reaffirmation of the disapproval of the extramural schools on August 8, 1946, and the decision in the *Mann* case where the Supreme Court considered the whole problem and pointed out to the Board of Medical Examiners that it could not by administrative practice escape the mandatory requirements of law. See also *Weiss* v. *State Board of Equalization* (1953), 40 Cal. 2d 772, 776-777, 256 Pac. 2d 1, where the Supreme Court held that an administrative agency is free to re-examine its policies. Not only is this applicable in the instant case, but the board had, since the prior admissions, received the Supreme Court's decision in the *Mann* case which required it to reconsider its prior action. The board also had advice from its official legal adviser, the Attorney General of the State of California, on November 16, 1950. On November 16, 1950, the question was asked whether:

> ". . . it is permissible for the board to consider all graduates of the so-called extramural schools as being graduates of a disapproved school regardless of their dates of graduation or must we consider those applicants who graduated from the extramural schools prior to the Board's disapproval in 1939 as meeting the requirements for admission to the examination for a physician and surgeon's certificate provided they met the other requirements exacted of graduates of foreign medical schools?"

The Attorney General gave the following answer:

> "The Business and Professions Code, and prior statutes identified as the Medical Practice Act,

have at all times required the affirmative approval of schools in order to qualify the graduates thereof for consideration as applicants for licensure in this State. No such approval has ever been granted. *All the described schools and such applicants are, therefore, ineligible to licensure.*

"It is immaterial that, at subsequent dates, in order to dispose of particular cases or to make their position specifically known, the Board may have made orders expressly 'disapproving' the particular school. These issues were fully considered and decided to this effect in the case of *Mann* v. *Board of Medical Examiners*, 31 Cal. 2d 30, 33 and 34" (emphasis added).

(See Exhibit B-32, the letter dated November 16, 1950.) Since the *Mann* case and the letter from the Attorney General, the board has consistently followed this advice. Probably the August 8, 1946 resolution was passed to cure any nullification or waiver of the 1939 resolution by the licensing of Golden and Lazaroff (CT p. 13, ll. 1-8).

The authorities cited by the petitioner on the issues of discrimination are clearly not applicable. The celebrated case of *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 Sup. Ct. 1064, bears no factual resemblance to the facts in the instant case. In the case at bar the respondent was acting some seven years after the two admissions relied on, after the reassertion of the disapproval of the extramural schools, and after a decision of the State Supreme Court (*Mann* v. *Board of Medical Examiners* (1947), 31 Cal. 2d 30, 187 Pac. 2d

1) which clearly defined the Board's powers and duties in this field.

In the *Yick Wo* case large numbers of a particular race were involved and the discrimination was apparent on its face. Here but two persons were granted privileges under allegedly somewhat similar qualifications. Moreover, how can it be said that the Board is discriminating against the petitioner when at the time of the Board's disapproval of the schools which he attended it could not possibly have had him in mind?

In the case of *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, the court held that New Mexico had denied the applicant due process when it did not permit him to qualify as a lawyer when there was no basis for its finding that he failed to meet standards of good moral character because of his prior use of aliases to obtain employment; his arrests with no convictions; and his membership in the Communist Party from 1932 to 1940. That case is not persuasive insofar as the case at bar is concerned when one realizes that there is a rational basis for the respondent Board of Medical Examiners' denial of the reciprocity medical license without examination to this petitioner who had attended two unapproved foreign medical schools and two disapproved foreign medical schools. The petitioner had also failed to prove to the respondent board that his medical education was equivalent to the standards required by California after a full hearing before the Board of

Medical Examiners and a complete review by the Superior Court, District Court and Supreme Court of the State of California.

In this regard it is important to note that the State of California specifically provides a means for graduates of nonapproved schools to obtain approval of a school even if it has been specifically disapproved by the Board of Medical Examiners. The provisions of Section 2174 of the Business and Professions Code heretofore cited permitted the petitioner herein to commence an action in the superior court against the Board of Medical Examiners to compel it to approve the school.

His failure to prove the equivalence of the foreign medical schools which he attended to the California requirements hardly amounts to a denial of due process or equal protection of the laws. The superior court on remand specifically considered the proceeding to be an application for approval of the foreign medical schools on behalf of the petitioner under the provisions of Section 2174 of the Business and Professions Code (CT No. 2, p. 4, ll. 17-20; p. 5, ll. 18-21; p. 16, ll. 8-16). The finding of the superior court that the petitioner had failed to sustain the burden of proof is in conformity with the provisions of Section 2174 of the Business and Professions Code and the case of *Arwine* v. *Board of Medical Examiners* (1907), 151 Cal. 499, 91 Pac. 319, where the court stated that the burden of proof was upon the applicant to prove that his medical college was up to prescribed stand-

ards. To the same effect is *Mann* v. *Board of Medical Examiners* (1947), 31 Cal. 2d 30, 187 Pac. 2d 1.

CONCLUSION

Wherefore, respondent urges this Court to deny the petition for certoirari.

Respectfully submitted,

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